Supreme Court, U. S.
FILED
AUG 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-192

COMMONWEALTH OF VIRGINIA, *Ex Rel.*
STATE CORPORATION COMMISSION,
Petitioner,

v.

FARMERS AND MERCHANTS NATIONAL BANK,
Respondent.

PETITION FOR WRIT OF CERTIORARI
BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION	2
STATUTES INVOLVED	2
STATEMENT OF FACTS	2
ARGUMENT	4
CONCLUSION	12

TABLE OF CASES

First National Bank in Plant City, Florida v. *Dickinson, et al.*, 396 US 122 (1969) 4, 5, 8, 9, 10

Jackson v. *First National Bank of Valdosta*, 246 F. Supp. 134 (1965) 5, 6, 10

Dunn v. *First National Bank of Cartersville*, 345 F. Supp. 853 (1972) 6

Michigan National Bank v. *Saxon* (Unreported) Civ. No. 821-862 (D., D.C. 1962) 7

North Davis Bank v. *First National Bank of Layton*, 457 F.2d 820 (1972) 7

Driscoll v. *Northwestern National Bank of St. Paul*, 349 F. Supp. 245 (1972) 8

First National Bank v. *Walker Bank and Trust Company*, 385 US 252 (1966) 11

First National Bank of Fairbanks v. *Camp*, 465 F.2d 586 (1972) 11

Nebraskans for Independent Banking, Inc. v. *The Omaha National Bank* (Unreported) No. 75-1109, Nebraska, United States Court of Appeals for the Eighth Circuit, August 5, 1975 9

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OPINIONS BELOW

The opinion and order of the United States District Court for the Western District of Virginia is reported at 580 F.Supp. 568 and is set forth in the Appendix, App. 3 filed herein with the Petition.

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the district court is not reported and is set forth in the aforesaid Appendix, App. 1.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTION

The sole question in this case is whether the Court of Appeals erred in affirming the judgment of the United States District Court in this case.

STATUTES INVOLVED

The pertinent statutes involved in this case are 12 U.S.C. § 36; § 36(c); § 36(c)(1) and (2); and§ 36(f).

STATEMENT OF FACTS

On August 16, 1972, an option agreement was executed by the respondent to purchase property for the erection of a drive-in facility as an extension of the Front Royal branch banking office located at Main and Crescent Streets.

On September 22, 1972, application was made to the Comptroller of the Currency for approval to erect a drive-in facility, and, on November 9, 1972, the Comptroller concluded that the addition was a mere extension of the existing banking office rather than a branch separate and apart therefrom and that consequently no approval or certification was required.

On November 24, 1972, the respondent acquired title to the said property by deed recorded in the Clerk's Office of the Circuit Court of Warren County, Virginia. Construction was commenced in July of 1973 to erect the drive-in facility. The facility was completed in January of 1974 and opened on or about January 23, 1974.

The property on which the facility is located is 204 feet from the rear of the branch office and separated by Crescent and Peyton Streets; the said property is bounded on the North by a residence and a school; bounded on the East by Crescent Street; bounded on the South by Peyton Street, and on the West by North Royal Avenue.

The branch banking office located at Main and Crescent Streets is bounded on the South by Main Street; on the East by a commercial building at the time the facility was constructed; on the North by a municipal parking lot and on the West by Crescent Street.

The drive-in facility located on the bank's customer parking lot was constructed on the closest available property. There are no intervening structures. There are no pneumatic tubes connecting the drive-in facility with the branch; however, the respondent agreed to make this installation if it was necessary.

The drive-in facility has strictly a teller function and all of the business transacted is processed at the Main Street office. It is manned by one full-time teller; has no branch manager; does not maintain separate records; does not have a vault; has the same telephone number and is serviced by an extension, and its employee is a part of the Main Street branch office.

The parking area on which the drive-in facility is located makes it possible for customers to avail themselves of the services of the Main Street Office, which include the making of loans, safe deposit boxes, paying and receiving and general banking.

ARGUMENT

I. Decisions Below

The district court did not err and it correctly determined as a matter of federal law that the facility was not a branch.[1]

The Court of Appeals did not err in affirming the judgment of the district court.[2]

II. FEDERAL LAW

The petitioner seeks review of the decision of the Fourth Circuit Court of Appeals because it poses a threat to the dual banking system of the United States. There is nothing in the record of this case to support such a contention. The policy of competitive

[1] The petitioner's contention that the district court placed any reliance on the action taken by the Comptroller is erroneous. Reference is made to the Opinion and Order of The Honorable James C. Turk, District Judge, in which he stated:

> "The Court is well aware of the problems inherent in its refusal to adopt the simple expedient of labeling all free-standing structures as separate branches. This Court is comforted, however, in its knowledge that a case-by-case consideration will do greater justice and better comport with legislative intent and judicial sense (and) . . . this Court has engaged in an independent consideration of all factors relating to this case and had made an independent judgment based on its findings . . ."

[2] "In a thorough and carefully considered decision, the district court concluded that the question of whether a banking facility constitutes a "branch" is a question of federal law (First National Bank in Plant City, Fla. v. Dickinson, 396 U.S. 122 (1969)); and, applying federal law, it concluded further that the drive-in facility which was the subject of litigation was not a "branch" but an extension of an existing banking office, the maintenance of which was authorized under both state and federal law. We think that the district court was correct in its conclusions for the reasons and the authorities set forth in its opinion. The judgment of the district court, is therefore, AFFIRMED."

equality has no application to the case before this Court. The facility was found to be an extension of an existing banking office and there is no question that it can be operated under the laws of Virginia.

If, on the other hand, a determination had been made that the facility was a branch, then it could not have been operated under the laws of Virginia.

The Courts have had no difficulty in determining whether a facility is in fact a branch based upon the criteria established by the Supreme Court in the case of *First National Bank in Plant City, Florida* v. *Dickinson, et al,* 396 US 122(1969), and a consideration of the factors enunciated in the case of *Jackson* v. *First National Bank of Valdosta,* 246 F.Supp. 134 (1965).

In the Dickinson case, *supra,* the Court stated:

> "We reject the contention made by amicus curiae National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36(f). Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, Walker Bank, supra, for in § 36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch". "
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> * * *
>
> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

"Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch;" by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more."

The factors referred to in the *Valdosta* case, *supra,* namely:

1. The distance separating the main banking house and the banking facility;
2. Number of intervening structures;
3. Lack of physical connection within the main banking office and the drive-in facility;
4. The economic effect of the drive-in facility on the balance of competition between the plaintiff bank and the defendant bank;

have been adhered to in other cases to determine whether an additional banking installation is apart from existing banking premises or merely an extension thereof.

In the case of *Dunn* v. *First National Bank of Cartersville,* 345 F.Supp. 853 (1972), Court, using these factors considered, found distinguishable characteristics in that:

1. The distance separating the facility and the main building was 40 feet.
2. There was a street but no building between the facility and the main building.
3. A pneumatic tube connected the facility and the main building.

4. There was no expansion into a new banking market and consequently no imbalance was created in the existing scheme of competition between local banks.

In the unreported case of *Michigan National Bank* v. *Saxon,* Civ. No. 821-862 (D., D.C. 1962), the Court stated:

"It does not mean, however, that every time a bank rents an additional room or additional offices in another building, as banks do sometimes when their business expands, that they are opening a new branch. The words 'additional office' must be reasonably construed as meaning a separate and independent office, operating in the same way as branch banks generally operate, and not merely additional office space to an existing facility."

The Court held the facility not to be a branch in the *Michigan National Bank* case, *supra,* and the facts were:

1. The facility to be 500 feet away from the branch office erected on a parking lot.
2. No intervening structures.
3. A pneumatic tube connecting the facility and branch office.
4. There was no expansion into a new banking market and consequently no imbalance was created in the existing scheme of competition between local banks.

In the case of *North Davis Bank* v. *First National Bank of Layton,* 457 F.2d 820 (1972), the Court held that the facility was not a branch based upon the following facts:

1. The proposed facility was 100 feet away from the present banking office across a street 66 feet wide on a bank owned lot.

2. *There were no intervening* structures between the facility and branch office.
3. Pneumatic tubes connected the facility and the present office.
4. The facility provides a service necessitated by increasing demand to accommodate customers who arrive at the bank in automobiles. There was no expansion into a new banking market and consequently no imbalance was created in the existing scheme of competition between local banks.

The Court, relying on the *Dickinson* case, *supra,* further stated:

> "There is no fixed test for determining what constitutes a branch bank. Each case must be considered on its own facts."

In the case of *Driscoll* v. *Northwestern National Bank of St. Paul,* 349 F. Supp. 245 (1972) [3], the facility was held not to be a branch bank based upon the following facts:

1. Three walk-up television tellers were located in the same building as the main banking office approximately 300 feet from the main banking floor.

[3] The *Driscoll* case, supra, has been reversed and remanded to the comptroller of the Currency for review on the ground that space which the bank originally planned to occupy between the contested TV teller units and the main banking floor has been occupied by other businesses. The Appellate Court did not refute the basis upon which the Comptroller and the district court determined the TV teller units merely an extension of the existing premises. Pursuant to the Court's order, the Comptroller of the Currency reviewed this case and on March 13, 1975, found there were no material changes in the facts.

2. Pedestrian concourse connected the facility and the main office as well as being connected by a pneumatic tube, telephone and TV cables.
3. There was no expansion into a new banking market and consequently no imbalance was created in the existing scheme of competition between local banks.

In the unreported case of *Nebraskans for Independent Banking, Inc.* v. *The Omaha National Bank,* (No. 75-1109, Nebraska, United States Court of Appeals for the Eighth Circuit, August 5th, 1975) [4], the Court found the drive-in facility to be an integrated extension of the main bank and not a branch based upon the following facts:

1. The drive-in facility was located 102 feet from the main bank and as close to the main bank as was practicable.
2. Connected by a pneumatic tube system.
3. The operation of the facility was integrated with the main bank and directed by officers in the main bank.
4. The drive-in facility did not expand in a material way customer access in a geographical area not previously served.

The facts in the *Dickinson* case, *supra,* are clearly distinguishable from those in the case before this Court. Application was there made to engage in an activity incidental to its banking function which activity was to be carried on one mile from its existing banking office.

[4] A motion for rehearing has been filed in this case.

It did not involve the extension of the premises of the existing office nor was this contention ever made.

The Court held that:

> "Since the putative deposits are in fact received by a bank facility *apart from* its chartered place of business, we are compelled in construing § 36(f) to view the place of delivery of the customer's cash and checks accompanied by a deposit slip as an additional office or branch place of business at which deposits are received." Emphasis added.

In this case the District Court made its finding, after engaging in an independent consideration of all of the factors, that the facility was not apart from its chartered place of business.

III. Competitive Equality

In determining whether a facility is in fact a branch, one of the criteria established in the *Valdosta* case, *supra,* was economic effect of drive-in facility to the balance of competition between the plaintiff bank and the defendant bank.

This consideration is not to be confused with the doctrine of competitive equality. It is nothing more than one of the factors used by the Courts to make a determination of what is *apart from* the chartered premises. Emphasis added.

Its significance in the case before this Court lies in the fact that the extension did not pierce a new competitive market. It was located as close to the existing banking office as possible with no intervening structures; provided a drive-in facility together with parking for existing bank customers; faced the existing banking office; and was bounded on the North by a resi-

dence and a school, on the East by Crescent Street, on the South by Peyton Street, and on the West by North Royal Avenue.

On the other hand, "competitive equality" as intended by Congress and enunciated by the U.S. Supreme Court in the *Walker Bank* case, *infra,* and *Dickinson* case, *supra,* is simply an expression that national and state chartered banks should be *equal* with respect to their opportunity to establish branch banks. Consequently, where it is determined that branch banking is not being engaged in, the doctrine of "competitive equality" does not apply.

Thus, the Supreme Court, in the case of *First National Bank* v. *Walker Bank and Trust Company* 385 US 252 (1966), stated:

> "It appears clear from this resumé of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and State banks on a basis of "competitive equality" insofar as branch banking was concerned."

More recently the Court of Appeals for the District of Columbia in *First National Bank of Fairbanks* v. *Camp,* 465 F.2d 586 (1972) held that:

> "National banks are to be subject to the same statutory restrictions on branch establishment as are state banks in each state."

Competitive equality is restricted to whether branching is permitted under state law. Once a determination is made that the facility is an extension of an existing national branch bank, the services offered, the customer convenience, access, size and type of signs, size or color of the building, hours, and number of employees are not factors subject to restrictions by state law.

CONCLUSION

The definition of what constitutes branch banking is controlled by federal law. State law definitions or the rulings of the State Banking Commission are not applicable.

There is no issue of competitive equality in the case.

Each case must be determined on its own facts. The Judge in the district court based his judgment on "an independent consideration of all factors relating to this case" and made an independent judgment based on his findings. The Court of Appeals referred to the judgment of the district court as a "thorough and carefully considered" decision and affirmed it.

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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